

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
	)	
Petitions for Declaratory Ruling and Retroactive	)	CG Docket No. 05-338
Waiver of 47 C.F.R. § 64.1200(a)(4)(iv) Regarding	)	
the Commission's Opt-Out Notice Requirement for	)	
Faxes Sent with the Recipients' Prior Express	)	
Invitation or Permission	)	

**RESPONSE OF ASD SPECIALTY HEALTHCARE, INC., D/B/A BESSE MEDICAL,**  
**AMERISOURCEBERGEN SPECIALTY GROUP, INC., AND**  
**AMERISOURCEBERGEN CORPORATION IN OPPOSITION TO APPLICATIONS**  
**FOR FULL COMMISSION REVIEW.**

The Applicants for full Commission review ("Applicants") improperly seek to have the Commission consider the same arguments it has already considered and rejected. Specifically, the Applicants argue that: 1) the Commission has no authority to waive violations of the TCPA regulations; 2) the record does not support a "presumption of confusion"; and 3) certain entities—not the Petitioners here—had actual knowledge that the opt-out requirement applied to solicited faxes. Both the Commission and the Bureau already gave proper consideration to each of these arguments and rejected them in their Orders dated October 30, 2014 and August 28, 2015.<sup>1</sup> Accordingly, for the same reasons discussed by the Commission and Bureau in those Orders, the Applications for Full Review should be denied.

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<sup>1</sup> Indeed, the Applicants concede that they "filed comments on 48 post-order waiver petitions from November 18, 2014 to June 12, 2015." See Application for Review of Beck Simmons, LLC *et al.* ("Application") at 3. As such, the Applicants admit that they made each of these arguments on prior occasions and that the Commission already considered them.

**I. THE COMMISSION HAS ALREADY DECIDED THAT IT HAS AUTHORITY TO GRANT RETROACTIVE WAIVERS REGARDING OPT-OUT REQUIREMENTS.**

As they did in their prior responses to individual Petitioners' waiver requests, the Applicants spend much of their Applications arguing that the Commission had no authority to grant retroactive waivers of the opt-out requirements as applied to solicited faxes and that the Commission's grant of such waivers violates the separation of powers. *See* Application at 4-9; TCPA Plaintiffs' Dec. 12, 2014 Comments on Petitions for Waiver, attached as Exhibit A. But, as was noted in several replies in support of Petitions for Retroactive Waiver, the full Commission already considered and rejected this exact argument in its October 30, 2014 Order:

Finally, we reject any implication that by addressing the petitions filed in this matter while related litigation is pending, we have "violate[d] the separation of powers vis-à-vis the judiciary," as one commenter has suggested. By addressing requests for declaratory ruling and/or waiver, the Commission is interpreting a statute, the TCPA, over which Congress provided us authority as the expert agency. Likewise, the mere fact that the TCPA allows for private rights of action based on violations of our rules implementing that statute in certain circumstances does not undercut our authority, as the expert agency, to define the scope of when and how our rules apply.

October 30, 2014 Commission Order, ¶ 21. *See also* August 28, 2015 Bureau Order, ¶ 13 (citing the same). As the Commission and Bureau correctly indicated, if the Commission had the power to make the rule regarding opt-out requests, it must also have had the power to grant waivers of the rule. The Applicants' argument to the contrary is as flawed now as it was when the Commission and Bureau originally rejected it. The Commission and Bureau considered the Commission's own rules and its October 30, 2014 Order to determine that certain Petitioners were entitled to a retroactive waiver of the TCPA regulations' opt-out requirements. Each court still has the authority to determine how the waiver impacts the factual scenario before the court. *See* August 28, 2015 Order, ¶ 17 ("We reiterate the Commission's statement that the granting of

a waiver does not confirm or deny whether the petitioners had the prior express permission of the recipients to send the faxes. That remains a question of fact for triers of fact in the private litigation.”) The Commission and Bureau correctly granted waivers regarding the regulations’ opt-out requirements, and there is no need for full Commission review of the grant of those waivers.

**II. THE COMMISSION AND BUREAU ALREADY PROPERLY CONSIDERED AND RULED UPON WHETHER THE FOOTNOTE TO THE 2006 ORDER CAUSED CONFUSION.**

**A. THE APPLICANTS’ REFERENCES TO 2006 RECONSIDERATION PROCEEDINGS HAVE NO BEARING ON THE OCTOBER 2014 ORDER OR THE BUREAU’S RULING ON THE PETITIONS FOR RETROACTIVE WAIVER.**

As in their prior filings with the Commission, the Applicants include in their Application a lengthy discussion of reconsideration proceedings that took place almost a decade ago, following the Commission’s release of the 2006 regulations. *See* Application , 9-13. Specifically, the Applicants refer to a petition filed on behalf of CBS for reconsideration of those regulations, and various comments on that petition, for the proposition that petitioners were aware that the regulations applied to solicited as well as unsolicited faxes. *Id.* The Applicants do not, however, explain how CBS’s mental state and knowledge in 2006 could have any impact on the Petitions for Retroactive Waiver.

Nor do they explain how those proceedings are relevant to the October 30, 2014 Commission Order. Although that Order specifically acknowledged that it was the Commission’s intent to make the 2006 regulations applicable to solicited and unsolicited faxes, the Commission noted that there was confusion and misplaced confidence caused by the language of the regulations, in particular footnote 154 (21 FCC Rcd at 3810, n. 154), and by the manner of notice provided. October 30, 2014 Order, ¶1, ¶¶ 24-25. This confusion was the basis

for the grant of retroactive waivers in the Order and permission for other similarly situated petitioners to seek the same relief. *Id.* ¶¶ 27-28.

The Applicants’ references to the 2006 proceedings are at best another attempt to seek reconsideration of the October 30, 2014 Order, by challenging the Bureau’s August 28, 2015 Order. Procedurally, such a motion is improper here because the Applicants—whose counsel was extensively involved in the proceedings leading up to the Order—could have raised the issue of the 2006 proceedings with the Commission prior to the entry of the Order. If they did so, then there is no need to raise it for at least the third time in seeking full Commission review (the Applicants also raised this issue in response to certain Petitions for Retroactive Waiver. *See, e.g.,* Exhibit A, at 40-45). If the Applicants did not raise the 2006 proceedings prior to entry of the 2006 Order, then they have waived that argument and it should not be considered here. In any event, the Applicants do not assert that any of the Petitioners for Retroactive Waiver had any involvement in or filed their own comments in the 2006 reconsideration proceedings – because they did not. The Applicants’ request to revisit the Commission and Bureau Orders based on 2006 proceedings that the Commission had full opportunity to consider should be rejected.

**B. APPLICANTS AGAIN IMPROPERLY SEEK INDIVIDUAL FACT-FINDING ON WHETHER PARTICULAR PETITIONERS WERE CONFUSED BY FOOTNOTE 154 OF THE 2006 ORDER.**

The Applicants assert that there is no evidence that any person was actually confused by Footnote 154 of the 2006 Order. (Application, at 13-15) But as the Bureau Order acknowledges, the October 30, 2014 Order does not purport to require the Commission to make factual findings and hold an evidentiary hearing or other fact-finding process to determine who at what level of a petitioner’s organization had “actual knowledge” of the correct interpretation of the Regulations. *See* August 28, 2015 Order at ¶ 19 (“[W]e reject arguments that the Commission made actual,

specific claims of confusion a requirement to obtain the waiver...the Commission found that petitioners who referenced the confusing, contradictory language at issue are entitled to a presumption of confusion.”). Nor should it – such a standard would require extensive investigation and factual determinations for each petitioner, with the potential for inconsistent results. Rather, the Commission has already made a finding regarding the “[c]onfusion or misplaced confidence about the rule”, which “warrants some relief from its potentially substantial consequences.” October 30, 2014 Order, ¶ 27. Moreover, the Commission and Bureau both note that all Petitioners who were granted a retroactive waiver referenced Footnote 154 in their Petitions. *See* August 28, 2015 Order at ¶¶ 15-16; October 30, 2014 Order at ¶ 24. Accordingly, the Commission and Bureau both found that there was sufficient confusion to require a grant of retroactive waivers, and the Applications for Full Review should be denied.

Date: October 13, 2015

ASD SPECIALTY HEALTHCARE, INC.,  
D/B/A BESSE MEDICAL,  
AMERISOURCEBERGEN SPECIALTY  
GROUP, INC., AND  
AMERISOURCEBERGEN CORPORATION.

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# EXHIBIT A

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
Junk Fax Prevention Act of 2005	)	CG Docket No. 05-338
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	

**TCPA Plaintiffs' Comments on Petitions for Waiver of the Commission's Rule on  
Opt-Out Notices on Fax Advertisements Filed by Alma Lasers, ASD Specialty  
Healthcare, Den-Mat Holdings, and Stryker Corp.**

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December 12, 2014

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## Executive Summary

On October 30, 2014, the Commission granted “retroactive waivers” of 47 C.F.R. § 64.1200(a)(4)(iv) to defendants in private TCPA litigation and allowed “similarly situated” persons to seek waivers. The Commission stated “all future waiver requests will be adjudicated on a case-by-case basis” and did not “prejudge the outcome of future waiver requests in the order.” The Commission should deny the current petitions for four reasons.

*First*, the Commission has no authority to “waive” violations of the regulations “prescribed under” the TCPA in a private right of action.<sup>1</sup> Doing so would violate the separation of powers by dictating a “rule of decision” to the courts, which have exclusive power to determine whether “a violation” of the regulations has taken place, and by abrogating Congress’s determination that “each such violation” gives rise to \$500 in statutory damages.<sup>2</sup>

*Second*, the current petitioners are not “similarly situated” to the prior petitioners. Alma claims it was “not aware” of the rule, not that it was “confused,” and simple ignorance is insufficient. Any “presumption” that Alma was confused is rebutted because Alma had actual knowledge of the rules, having been sued for violating them in 2008.

ASD claims it “did not understand” the regulation, but it does not claim its misunderstanding stemmed from the two sources of “confusion” identified in the October 30 order (the notice of rulemaking and footnote 154). Plus, ASD has provided no evidence for its claim that its potential liability is “massive,” as it claims, or even “significant.”

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<sup>1</sup> *Nat. Res. Def. Council v. EPA*, 749 F.3d 1055, 1062 (D.C. Cir. 2014) (holding federal agency lacked authority to create affirmative defense to its own regulations in statutory private right of action).

<sup>2</sup> *United States v. Klein*, 80 U.S. 128, 147–48, 13 Wall. 128, 20 L.Ed. 519 (1872).

Den-Mat claims it was “confused” about the law, but it does not claim its confusion stemmed from the notice of rulemaking or footnote 154. Also like ASD, there is also no evidence Den-Mat’s potential liability is “crushing,” as it claims, or even “significant.”

Stryker does not claim it was “confused,” and the evidence demonstrates it had actual knowledge, having purchased its fax list under an agreement to include opt-out notice and comply “with all laws and regulations governing the transmission of unsolicited advertisements and facsimile communications.” The regulations it promised to follow are clear. Plus, Stryker’s potential liability is not “significant,” given its maximum exposure is \$22.5 million, which is 0.56% of Stryker’s nearly \$4 billion cash on hand.

*Third*, the record on the petitions for reconsideration of the 2006 order demonstrates that regulated parties immediately understood the new rules required “all faxed advertisements” to include opt-out notice, and that the “plain language” extended to “solicited facsimile advertisements.” These parties were not “confused” by the notice of rulemaking or footnote 154. This record was not raised in the petitions addressed in the October 30 order or the comments on those petitions, and it rebuts any “presumption” of confusion on the part of Alma, ASD, Den-Mat, and Stryker.

*Fourth*, even if the Commission grants retroactive waivers, it should not grant prospective waivers because it would endanger public health and safety. The current petitioners have a history of targeting physicians and other medical-care providers with fax advertisements, and granting a prospective waiver of the opt-out requirements would allow them to “lock in” any permission they hold today simply by not including opt-out notice on their faxes until April 30, 2015.

Before the  
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**TCPA Plaintiffs' Comments on Petitions for Waiver of the Commission's Rule on  
Opt-Out Notices on Fax Advertisements Filed by Alma Lasers, ASD Specialty  
Healthcare, Den-Mat Holdings, and Stryker Corp.**

Commenters are plaintiffs in private TCPA actions pending in the United States District Courts against petitioners Alma Lasers, Inc. ("Alma"), ASD Specialty Healthcare Inc. ("ASD"), Den-Mat Holdings, LLC ("Den-Mat"), and Howmedica Osteonics Corp./Stryker Corp. ("Stryker"). Petitioners seek "retroactive waivers" of the regulation requiring opt-out notice on fax advertisements sent with "prior express invitation or permission," which they intend to present to the courts presiding over their civil lawsuits, asking them to dismiss any claims based on violations of the opt-out regulations "prescribed under" the TCPA.<sup>3</sup> The Consumer and Governmental Affairs Bureau sought comments on the petitions November 28, 2014.<sup>4</sup>

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<sup>3</sup> See *Petition of Howmedica Osteonics Corp., Stryker Corp. for Waiver*, CG Docket Nos. 02-278, 05-338 (filed Nov. 7, 2014) (Stryker Petition); *Petition of Alma Lasers, Inc. for Retroactive Waiver*, CG Docket Nos. 02-278, 05-338 (filed Nov. 14, 2014) (Alma Petition); *Petition of Den-Mat Holdings, LLC for Retroactive Waiver*, CG Docket No. 05-338 (filed Nov. 20, 2014) (Den-Mat Petition); *Petition for Retroactive Waiver by ASD Specialty Healthcare Inc., d/b/a Besse Medical, AmerisourceBergen Specialty Group, Inc., and AmerisourceBergen Corp.*, CG Docket No. 05-338 (filed Nov. 20, 2014) (ASD Petition).

<sup>4</sup> *Consumer & Governmental Affairs Bureau Seeks Comment on Petitions For Waiver of the Commission's Rule on Opt-out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338 (Nov. 28, 2014).

### Procedural History

On October 30, 2014, the Commission issued the Opt-Out Order,<sup>5</sup> granting “retroactive waivers” intended to relieve the covered TCPA defendants of liability in private TCPA actions for past violations of § 64.1200(a)(4)(iv) as well as prospective waivers for any future violations through April 30, 2015.<sup>6</sup> The Commission invited “similarly situated” parties to petition for similar waivers.<sup>7</sup>

Undersigned counsel filed comments on two subsequent petitions on November 18, 2014,<sup>8</sup> asking the Commission to clarify whether the standard for a waiver is that the petitioner was *actually* confused about whether opt-out notice was required when it sent its faxes<sup>9</sup> or whether the Commission created a *presumption* that petitioners are confused in the absence of evidence they were “simply ignorant” or knowingly violated the law.<sup>10</sup>

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<sup>5</sup> *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel. Oct. 30, 2014) ¶ 26.

<sup>6</sup> Plaintiff’s counsel opposed these “waivers,” arguing the Commission has no authority to interfere in private TCPA litigation and that such an order would violate the separation of powers and due process and constitute a taking without just compensation. On November 10, 2014, Plaintiffs appealed the waiver portion of the order to the D.C. Circuit Court of Appeals in *Sandusky Wellness Center, LLC v. FCC*, No. 14-1235 (D.C. Cir. Nov. 10, 2014).

<sup>7</sup> Opt-Out Order ¶ 30.

<sup>8</sup> *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Beck Simmons LLC’s Comments on Francotyp-Postalia Petition (Nov. 18, 2014); *id.*, Physicians Healthsource, Inc.’s Comments on Allscripts Petition (Nov. 18, 2014).

<sup>9</sup> Opt-Out Order ¶ 26 (stating waiver was justified because footnote 154 of the 2006 Junk Fax Order “led to confusion or misplaced confidence on the part of petitioners”); *id.* ¶ 32 (stating Commission granted waivers “to parties that have been confused by the footnote”).

<sup>10</sup> *Id.* (stating combination of footnote 154 and lack of notice “presumptively establishes good cause for retroactive waiver,” finding no evidence “that the petitioners understood that they did, in fact,

Plaintiffs' counsel explained they expect dozens of defendants in TCPA fax litigation to petition the Commission for waivers before April 30, 2015, and that the Commission should expect waiver requests from defendants in non-fax TCPA litigation, as well. Counsel noted a defendant in a text-message case had already sought a waiver and that a commenter on a separate petition had suggested the Commission create a "path for retroactive waiver" from the telemarketing rules in private TCPA litigation.<sup>11</sup>

On December 5, 2014, Wells Fargo filed comments citing the Opt-Out Order as authority for a retroactive waiver absolving TCPA defendants of liability for cellular-phone calls where the "called party" is not the "intended recipient."<sup>12</sup> Wells Fargo interprets the Opt-Out Order to mean that where (1) a "disparity between an order issued by the Commission and a Commission rule led to substantial confusion among affected parties" and (2) a defendant is at risk of "potentially substantial damages," the Commission may extinguish the private cause of action with a waiver.<sup>13</sup> Applying this standard, Wells Fargo argues there is "substantial confusion surrounding the interpretation of the term 'called party' and the FCC's implementing rule" and that unidentified defendants are subject to "substantial" liability, so the elements for a waiver are satisfied.<sup>14</sup> Wells Fargo does not claim

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have to comply with the opt-out notice requirement," and "emphasiz[ing]" that "simple ignorance" of the law "is not grounds for a waiver").

<sup>11</sup> *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Expedited Declaratory Ruling of the Consumer Bankers Assoc.*, CG Docket No. 02-278, Comments of ACA Int'l (Nov. 17, 2014) at 2 & 10.

<sup>12</sup> *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Expedited Declaratory Ruling of the Consumer Bankers Assoc.*, CG Docket No. 02-278, Reply Comments of Wells Fargo (Dec. 5, 2014) at 9 & n.35 (citing Opt-Out Order ¶ 26).

<sup>13</sup> *Id.* at 9–10.

<sup>14</sup> *Id.*

it was confused about the meaning of “called party.”<sup>15</sup> It does not identify anyone in particular who was ever confused about that term.<sup>16</sup> Nor does it quantify the “substantial” damages it or any other party faces in private litigation.<sup>17</sup>

By one estimate, there were 2,069 private TCPA lawsuits filed in 2014 (as of October 31).<sup>18</sup> If the standard for a waiver from TCPA liability is that the law is “confusing” and that the petitioner is subject to “substantial” damages, the Commission should expect a waiver petition to be filed in the majority of TCPA cases. Plaintiffs reiterate their request that the Commission clarify the standards it applied in the Opt-Out Order.

### **Factual Background**

#### **A. The *Alma* litigation.**

##### **1. *Geismann v. Alma*—2008.**

*Alma*, a manufacturer of medical laser devices, was sued for violating § 64.1200(a)(4) on October 1, 2008, in Missouri state court in *Radha Geismann, M.D., P.C. v. Alma Lasers, Inc.*<sup>19</sup> The plaintiff, a medical practice in St. Louis, Missouri, owned by Dr. Radha Geismann, alleged *Alma* sent it “more than eight” unsolicited advertisements since December 2007, that

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Debt Collection Litigation & CFPB Complaint Statistics, October 2014, WebRecon, Nov. 21, 2014, available at <http://dev.webrecon.com/debt-collection-litigation-cfpb-complaint-statistics-october-2014>.

<sup>19</sup> Ex. A, *Geismann* Compl., No. 08 SL-CCO4126 (Cir. Ct., St. Louis Cty., Mo. Oct. 1, 2008). Plaintiffs have filed as exhibits to these comments only those documents that are not publicly available on the federal courts’ PACER system or the Commission’s ECF system, since a compilation of all documents cited would be voluminous. If the Commission prefers copies of these documents be filed in these proceedings, however, Plaintiffs’ counsel will gladly do so.

receiving these faxes “prevents other requested messages from being received,” and that the faxes were “bothersome and a harassment to Plaintiff” in her practice.<sup>20</sup>

The fax attached to the complaint promotes a “free seminar” to discuss “the latest in laser technology,” and promotes “Alma Lasers Wellness Through Technology” with the Alma trademark and “AlmaLasers.com” website, and a check box for “additional information.”<sup>21</sup> The fax states the “workshop” will cover subjects including “Pain Free Hair Removal,” “Skin Tightening,” and “Pixel-Fractional Resurfacing” and that participants will “gain experience through a hands-on lab” using Alma laser devices.<sup>22</sup>

The opt-out notice on the fax states, “[t]o be removed from the fax list please call 1.800.783.1714.”<sup>23</sup> The notice does not (1) state the consumer has a right to opt out, (2) state a sender’s failure to comply within 30 days is unlawful, (3) state the consumer must follow the opt-out instruction in the fax to make an enforceable request, (4) state the consumer must identify the fax number to which the request relates to make an enforceable request, or (5) provide both a fax number and domestic telephone number for requests.<sup>24</sup>

Dr. Geismann alleged the faxes violated “47 U.S.C. sec. 227(b)(1)(C) and 47 C.F.R. sec. 64.1200(a)(3),” which has since been renumbered as subparagraph (a)(4).<sup>25</sup> Dr. Geismann also alleged Alma “willfully or knowingly . . . violated the regulations prescribed

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<sup>20</sup> *Id.* ¶¶ 10, 17.

<sup>21</sup> *Id.*, Ex. A.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, Ex. A.

<sup>24</sup> *Id.*; *see* 47 C.F.R. § 64.1200(a)(4)(iii).

<sup>25</sup> *Id.* ¶ 13.

under 47 U.S.C. sec. 227(b),” warranting treble damages.<sup>26</sup> The *Geismann* case was not a class action, so Alma’s liability was limited to between \$4,000 and \$12,000 for the eight faxes at issue, and the case settled.

2. *Physicians Healthsource v. Alma*—2012.

On May 18, 2012, undersigned counsel filed a putative class action against Alma in Illinois state court on behalf of Physicians Healthsource, Inc., a medical practice in Cincinnati, Ohio, alleging Alma sent unsolicited fax advertisements to Physicians Healthsource on July 22, 2008, August 5, 2008, and August 19, 2008.<sup>27</sup> In addition, the complaint alleges that, even if Alma claims it had “prior express invitation or permission” to send the faxes, they violated the opt-out regulations, § 64.1200(a)(4)(iii)–(iv).<sup>28</sup> The complaint alleges Alma sent the same or similar fax advertisements to “forty or more persons” and that class certification was appropriate.<sup>29</sup> Alma removed to the United States District Court for the Northern District of Illinois on June 22, 2012.<sup>30</sup>

The faxes, which are attached to the complaint, are nearly identical to the fax in *Geismann*, promoting a “free seminar” to discuss “the latest in laser technology,” “Pain Free Hair Removal,” “Skin Tightening,” “Pixel-Fractional Resurfacing,” etc.<sup>31</sup> But the *Physicians Healthsource* faxes contain different opt-out notice, stating, “[t]o be removed from the fax list

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<sup>26</sup> *Id.* ¶ 23.

<sup>27</sup> See *Physicians Healthsource, Inc. v. Alma Lasers, Inc.*, No. 12-cv-04978 (N.D. Ill.), Notice of Removal and Compl. (Doc. 1) ¶¶ 12, 21.

<sup>28</sup> *Id.* ¶¶ 18, 21, 30.

<sup>29</sup> *Id.* ¶ 21.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*, Ex. A.

please call 1.800.783.1714 or fax this form back to 1.888.269.0559 and your fax will be removed immediately.”<sup>32</sup> Like the *Geismann* fax, these faxes do not (1) state the consumer has a right to opt out, (2) state a sender’s failure to comply within 30 days is unlawful, (3) state the consumer must use the instructions on the fax, or (4) state the consumer must identify the fax number to which the request relates.<sup>33</sup> Unlike the *Geismann* fax, however, these faxes include both a phone number and fax number for requests.

On October 11, 2012, Alma answered the complaint, asserting as affirmative defenses that “Plaintiff’s claims and those of any purported class are barred because they provided express consent, invitation and/or permission to receiving information from Defendant” and that “Plaintiff’s claims and those of any purported class are barred because they have an established business relationship with Defendant.”<sup>34</sup>

During discovery, Plaintiff uncovered additional fax advertisements Alma sent in September and October 2011.<sup>35</sup> Like the faxes attached to the *Geismann* and *Physicians Healthsource* complaints, these faxes promote “free seminars” to discuss Alma products.<sup>36</sup> The opt-out notice is different, however, stating “[y]ou have received this fax because you have had previous contact or requested information from [an Alma sales agent]/or Alma Lasers. To be removed from fax list, please supply fax number below and fax to 646-805-1312 &

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*; see 47 C.F.R. § 64.1200(a)(4)(iii).

<sup>34</sup> *Physicians Healthsource v. Alma*, Def.’s Answer (Doc. 21) at 9.

<sup>35</sup> Ex. D. Alma produced this fax labeled ALMA002140.

<sup>36</sup> *Id.*

number will be removed immediately. We apologize for any inconvenience! Fax number to be removed \_\_\_\_\_.”<sup>37</sup>

Like the faxes attached to the *Geismann* and *Physicians Healthsource* complaints, the 2011 notice does not (1) state there is a right to opt out, (2) state a sender’s failure to comply within 30 days is unlawful, or (3) state the consumer must use the instructions on the fax.<sup>38</sup> Like the *Geismann* fax (and unlike the *Physicians Healthsource* faxes), the 2011 language does not include both a telephone number and fax number. But unlike both the *Geismann* and *Physicians Healthsource* faxes, the 2011 notice advises the consumer to identify the fax number to which the request relates, as required for an enforceable opt-out request.<sup>39</sup> The 2011 faxes were sent after the faxes from 2008 attached to the *Physicians Healthsource* complaint, but they fall within the class period, which extends from May 18, 2008, to the present.<sup>40</sup>

Discovery revealed that Alma purchased more than 150,000 fax numbers of physicians and dentists from a third party called BrightPath Marketing Services, LLC.<sup>41</sup> The BrightPath invoices show Alma purchased four separate fax lists as follows:

Date	Quantity (Fax Numbers)	Description	Amount
November 13, 2007	60,076	Physicians based on specialties	\$33,500.04
July 21, 2008	5,538	Dentists in Florida	\$1,237.98
October 28, 2008	79,285	Physicians based on specialties	\$37,787.43

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*; see 47 C.F.R. § 64.1200(a)(4)(iii).

<sup>39</sup> *Id.* § 64.1200(a)(4)(v)(a).

<sup>40</sup> The courts apply the four-year “catch-all” limitations period in 28 U.S.C. § 1658(a) to TCPA claims. See, e.g., *Giovanniello v. ALM Media, LLC*, 726 F.3d 106, 115 (2d Cir. 2013).

<sup>41</sup> *Physicians Healthsource v. Alma*, Deposition of Kim Bello (Doc. 78-1) at 46.

November 5, 2008	5,254	Dentists in New Jersey	\$1,756.28
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Alma personnel testified the faxes were transmitted by fax broadcaster Westfax.<sup>42</sup>

Alma’s contract with Westfax states that Alma “will fully comply with” the applicable “laws, rules and regulations, including in particular, the Telephone Consumer Protection Act (“TCPA”) and all state laws similar or related thereto” and states “[t]he TCPA provides that the sender is solely liable for opt-out notice compliance and violations.”<sup>43</sup>

Alma’s marketing director testified she created the 2011 fax images and provided them to Westfax and that, prior to doing so, each fax went through a “sign-off process” in which the content was approved by Alma’s senior director of marketing, Alma’s regulatory department, Alma’s general manager, and Alma’s legal department.<sup>44</sup>

On April 17, 2014, Physicians Healthsource filed its motion for class certification, relying on the report of its expert, Robert Biggerstaff, explaining the documents and data showed that Westfax transmitted 1,455,684 error-free fax transmissions of Alma advertisements from January 8, 2008, to October 17, 2011.<sup>45</sup> Of those faxes, 974,874 were sent within the four-year statute of limitations.

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*, Westfax/Alma Customer Agreement (Doc. 78-6) ¶¶ 4, 7. The sender is not “solely” liable in all circumstances, since the Commission ruled in 2003 that fax broadcasters may be held “jointly and severally liable,” along with their clients, where they have “a high degree of involvement or actual notice” of violations. *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report & Order, 18 FCC Rcd 14014 ¶¶ 194–95 (July 3, 2003). The Commission reiterated that rule in the 2006 Junk Fax Order, and Westfax filed comments objecting to the rule on June 26, 2006, but did not petition for reconsideration or appeal.

<sup>44</sup> *Id.*, Deposition of Karen Wheeler (Doc. 78-2) at 55.

<sup>45</sup> *Id.*, Expert Report of Robert Biggerstaff (Doc. 78-8) ¶ 18.

On May 22, 2014, Alma filed its opposition to class certification, arguing that, although it purchased hundreds of thousands of fax numbers from BrightPath, it also collected an unspecified quantity of fax numbers from other sources, “including fax numbers provided by physicians in phone calls and other contacts with Alma sales representatives.”<sup>46</sup> Alma argued that, by providing their fax numbers, these physicians “consented to Alma faxing them information.”<sup>47</sup> Because these fax numbers were on the target lists it sent to Westfax, Alma argued, individual inquiries into permission prevent class certification and it can be held liable only for the three faxes attached to the complaint, and not the nearly one million fax advertisements it sent during the class period.<sup>48</sup>

On June 19, 2014, Plaintiff filed its reply in support of class certification, arguing Alma’s contention that individualized inquiries into permission were required failed as a matter of law because “[n]one of the faxes at issue in this case contain opt-out notice complying with 47 C.F.R. § 64.1200(a)(4)(iii)” and that “[w]ithout compliant opt-out notice, the defense of consent is unavailable.”<sup>49</sup> Accordingly, Plaintiff argued, “no individual determinations are required—either the faxes at issue had proper opt-out notice or they did not.”<sup>50</sup> The motion for class certification remains pending.

On November 14, 2014, Alma filed its petition for waiver. The petition claims Alma is “similarly situated” to the petitioners covered by the Opt-Out Order because (1) it “was

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<sup>46</sup> *Id.*, Def.’s Mem. Opp. Pl.’s Mot. Class Certification (Doc. 79) at 14.

<sup>47</sup> *Id.* at 15.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*, Pl.’s Reply Supp. Mot. Class Certification (Doc. 86) at 13.

<sup>50</sup> *Id.*

not aware that the requirement for opt-out language in the form required by Section 64.1200(a)(4)(iii) and (iv) applied” to faxes sent with permission and (2) it is “subject to substantial liability” in the litigation, considering the volume of faxes at issue.<sup>51</sup> Alma does not claim it “was not aware” of the rules because it was “confused” by footnote 154 in the 2006 Junk Fax Order or the notice of rulemaking or assert that anyone in Alma’s legal department read footnote 154 before signing off on the fax images provided to Westfax.<sup>52</sup>

On November 19, 2014, Alma submitted the Opt-Out Order and its waiver petition to the district court as supplemental authority in opposition to class certification, arguing the Commission granted the waivers because of general “confusion in the industry” regarding the opt-out rules.<sup>53</sup> Alma argued the Opt-Out Order supports its argument that a class cannot be certified because “certain members of the purported class requested and consented to receive faxes from Alma about its seminars.”<sup>54</sup>

In the alternative, Alma asked the district court for a “short stay” of the litigation pending the Commission’s ruling on its petition.<sup>55</sup> Physician’s Healthsource’s response to the motion to stay is due December 16, 2014 (four days from the deadline for these comments). Counsel anticipate arguing that a stay would be futile because the Commission will not find it in the “public interest” to grant a waiver to a party that sent hundreds of thousands of

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<sup>51</sup> Alma Pet. at 4.

<sup>52</sup> *Id.* at 1–5.

<sup>53</sup> *Physicians Healthsource v. Alma*, Def.’s Mot. Supplement the Record or in the Alternative Stay Proceedings (Doc. 99) ¶ 7.

<sup>54</sup> *Id.* ¶ 5.

<sup>55</sup> *Id.* ¶ 10.

non-compliant fax advertisements to medical-care providers using numbers on purchased, third-party lists for years after being sued for violating the Commission's rules.

Alma's petition states that Alma "understands the importance of compliance with Commission's rules, including the 2006 Order as clarified by the Order FCC 1-164, and has implemented procedures going forward to ensure compliance."<sup>56</sup> It does not explain what "procedures" it has implemented or explain what compliance failures led to the violations.<sup>57</sup>

**B. The ASD litigation.**

On September 19, 2013, undersigned counsel filed suit in the United States District Court for the Northern District of Ohio against ASD on behalf of Sandusky Wellness Center, LLC, a chiropractic practice in Sandusky, Ohio, alleging ASD sent an unsolicited fax advertisement to Sandusky Wellness on June 16, 2010.<sup>58</sup> In addition, the complaint alleges that, even if ASD claims it had "prior express invitation or permission" to send the fax, it violated the opt-out regulations.<sup>59</sup> The complaint alleges ASD sent the same or similar fax advertisements to "at least forty" persons, and that class certification is appropriate.<sup>60</sup>

The fax attached to the complaint states ASD (d/b/a "Besse Medical") is an "authorized distributor" of "Prolia," which it offers at the "introductory price" of \$825.<sup>61</sup> The opt-out notice states, "Besse Medical sends important product announcements, recall

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<sup>56</sup> Alma Pet. at 5.

<sup>57</sup> *Id.*

<sup>58</sup> *Sandusky Wellness Center, LLC v. ASD Specialty Healthcare Inc.*, No. 13-2085 (N.D. Ohio), Compl. (Doc. 1) ¶ 12.

<sup>59</sup> *Id.* ¶ 32.

<sup>60</sup> *Id.* ¶ 20.

<sup>61</sup> *Id.*, Ex. A.

notices, promotions, etc. via FAX. If you wish to opt-out and no longer receive FAX communications from Besse Medical, please check here ( ) and fax back to 1-888-736-8866, Attn: FAX OPT OUT. Please note that by opting out you will delay receipt of important notices, such as a product recall.”<sup>62</sup> The notice does not (1) state the consumer has a right to opt out, (2) state a sender’s failure to comply within 30 days is unlawful, (3) state the consumer must use the instructions on the fax, (4) state the consumer must identify the fax number to which the request relates, or (5) provide both a telephone number and fax number.<sup>63</sup> It also attempts to dissuade the recipient from opting out, which arguably violates the requirement that the right to opt out be “clearly” communicated.

On October 14, 2013, ASD answered the complaint, asserting as affirmative defenses that Sandusky Wellness and the other class members had an EBR with ASD and that they “never communicated to [ASD] a request *not* to send facsimiles” to their fax numbers<sup>64</sup> and that “plaintiff and/or the members of the putative class consented to and/or solicited the transmission of the facsimile at issue.”<sup>65</sup>

Discovery revealed ASD obtained its target fax numbers “from a third party, InfoUSA, Inc.,”<sup>66</sup> and that ASD “marketing personnel” designed the faxes and employed Westfax to transmit them.<sup>67</sup> ASD admitted it sent fax advertisements to more than 10,000

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<sup>62</sup> *Id.* ¶ 18.

<sup>63</sup> *Id.*; *see* 47 C.F.R. § 64.1200(a)(4)(iii).

<sup>64</sup> *Sandusky Wellness v. ASD*, Answer (Doc. 14) at 17–18, Third Aff. Defense (emphasis added).

<sup>65</sup> *Id.* at 18, Fourth Aff. Defense.

<sup>66</sup> Ex. B, ASD Supp. Objs. & Answers to Pl.’s First Set of Interrogatories, Resp. No. 13 (May 12, 2014).

<sup>67</sup> *Id.*, Resp. No. 15.

fax numbers.<sup>68</sup> To date, ASD has not provided any evidence supporting the claim that it obtained prior express permission to send faxes to numbers on a purchased, third-party list or evidence showing the dates, times, and quantities of fax transmissions, although it represented in a hearing on December 3, 2014, that it will produce its evidence of permission on the filing deadline for these comments, December 12, 2014.

On November 20, 2014, ASD filed its waiver petition claiming it is “similarly situated” to the petitioners in the Opt-Out Order because (1) it “did not understand the opt-out requirement to apply to solicited faxes” and (2) it is “potentially subject to massive liability” in the litigation.<sup>69</sup> ASD does not claim it “did not understand” the law because it read footnote 154 or the notice of rulemaking.<sup>70</sup>

ASD cites no evidence for its claim that it faces “massive” liability.<sup>71</sup> It admits it sent fax advertisements to more than 10,000 persons using the InfoUSA list, but it has not produced documents showing the precise number of faxes sent. On this record, ASD is subject to potential liability between \$5 million (at \$500 per fax) and \$15 million (at \$1,500 per fax). ASD’s parent corporation, AmerisourceBergen Corporation, is one of the largest pharmaceutical companies in the world; it reported \$673 million in income from continuing operations in 2014 from its Pharmaceutical Distribution operating segment, of which ASD is

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<sup>68</sup> Ex. C, ASD Amended Obj. & Resp. to Pl.’s First Request for Admissions, Resp. No. 16 (May 12, 2014).

<sup>69</sup> ASD Pet. at 5.

<sup>70</sup> *Id.* at 1–5.

<sup>71</sup> *Id.*

a part.<sup>72</sup> It holds \$1.8 billion in cash and cash equivalents.<sup>73</sup> The company does not disclose the *Physicians Healthsource* litigation to investors, meaning it does not consider its potential liability a “material” risk in deciding whether to invest in the company.<sup>74</sup>

Like Alma, ASD states it “understand[s] the importance of compliance with the Commission’s rules, including the 2006 Order as clarified by Order FCC 1-164,” and has “implemented procedures to ensure compliance.”<sup>75</sup> Also like Alma, ASD does not explain what “procedures” it has implemented or what compliance failures led to the violations.<sup>76</sup>

### C. The *Den-Mat* litigation.

On September 8, 2014, Plaintiffs’ counsel filed suit against Den-Mat in the United States District Court for the Central District of California on behalf of Alan L. Laub, DDS, Inc., a dentistry practice in Cincinnati, Ohio, alleging Den-Mat sent unsolicited fax advertisements to Dr. Laub’s office on September 27, 2010, and March 31, 2011.<sup>77</sup> In addition, the complaint alleges that, even if Den-Mat claims it had “prior express invitation or permission” to send the faxes, they violated the opt-out regulations.<sup>78</sup> The complaint

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<sup>72</sup> See AmerisourceBergen Corp. 2014 Form 10-K at 69–71, *available at* <http://www.sec.gov/Archives/edgar/data/1140859/000104746914009555/a2222308z10-k.htm> at 69–71.

<sup>73</sup> *Id.* at 22.

<sup>74</sup> *Id.* at 68–69.

<sup>75</sup> ASD Pet. at 6.

<sup>76</sup> *Id.*

<sup>77</sup> *Alan L. Laub, DDS, Inc. v. Den-Mat Holdings, LLC*, No. 14-7004 (C.D. Cal.), Compl. (Doc. 1) ¶ 11.

<sup>78</sup> *Id.* ¶¶ 17, 20, 30.

alleges Den-Mat sent the same or similar fax advertisements to “at least forty” persons and that class certification is appropriate.<sup>79</sup>

The September 2010 fax states dentists can “save \$400” (regularly \$2,395) on a “Destination Education” program in Las Vegas regarding “Lumineers” the “thin veneer patients ask for by name,” which it describes as “the new beginning for your patients and your practice.”<sup>80</sup> The March 2011 fax states dentists can “save \$600” on the program (also regularly \$2,395) in Las Vegas, which will “transform your practice,” along with a keynote speaker explaining how Lumineers products allowed him to “open vertical dimensions, as provisionals with implants and more.”<sup>81</sup>

The opt-out notice on both faxes states, “[i]f you wish to be removed from our fax list, please fax this form to 1-800-233-6628. YOU MUST INCLUDE YOUR FAX NUMBER TO BE REMOVED.”<sup>82</sup> This language does not (1) state the consumer has a right to opt out, (2) state a sender’s failure to comply within 30 days is unlawful, (3) state the consumer must use the instructions on the fax, or (4) provide both a phone number and fax number.<sup>83</sup> Unlike the Alma and ASD faxes, however, Den-Mat’s opt-out notice discloses that the recipient “must” identify the fax number to which the request relates.<sup>84</sup>

Den-Mat “denies that at the time the faxes were sent [2010 and 2011] opt-out language on solicited faxes was required” in its answer filed November 4, 2014, five days

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<sup>79</sup> *Id.* ¶ 19.

<sup>80</sup> *Id.*, Ex. A.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*; see 47 C.F.R. § 64.1200(a)(4)(iii).

<sup>84</sup> *Id.*; see 47 C.F.R. § 64.1200(a)(4)(v)(A).

after the Opt-Out Order was issued.<sup>85</sup> Citing the Opt-Out Order, Den-Mat asserts as an affirmative defense that “[a]t all times herein, Den-Mat was reasonably uncertain about whether the opt-out notice requirement in the Federal Communications Commission’s 2006 Junk Fax Order . . . applied to faxes sent with the recipient’s prior permission” and that “Den-Mat is entitled to retroactive relief for those faxes, if any, that are determined to have been sent with an insufficient opt-out notice.”<sup>86</sup> Den-Mat denies it sent the same or similar fax advertisements to “more than forty other recipients” or that “the number of class members is at least forty.”<sup>87</sup>

On November 20, 2014, Den-Mat filed its petition, claiming it will meet its burden of proving “prior express invitation or permission”<sup>88</sup> because Dr. Laub’s office had “repeated communication with its assigned Den-Mat sales representative over several years, yet, to Den-Mat’s knowledge, it never asked Den-Mat to refrain from sending it faxes.”<sup>89</sup> Den-Mat argues it is “similarly situated” to the petitioners covered by the Opt-Out Order because (1) it “was reasonably confused as to whether Solicited Faxes must include an opt-out notice” when it sent its faxes and (2) it is subject to “potentially crushing money damages” in the litigation.<sup>90</sup> Den-Mat does not state why it was confused or claim it read footnote 154 or the

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<sup>85</sup> *Den-Mat*, Answer (Doc. 21) ¶ 17.

<sup>86</sup> *Id.* at 8.

<sup>87</sup> *Id.* ¶¶ 15, 19.

<sup>88</sup> *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report & Order & Third Order on Reconsideration, 21 FCC Rcd 3787 (rel. Apr. 6, 2006) ¶ 46 (ruling, “the burden of proof rests on the sender to demonstrate that permission was given” and so senders should “promptly document that they received such permission”).

<sup>89</sup> *Den-Mat Pet.* at 6.

<sup>90</sup> *Id.* at 7.

notice of rulemaking.<sup>91</sup> Den-Mat does not state how many non-compliant faxes it sent or cite any evidence the potential liability would be “crushing.”<sup>92</sup>

Unlike Alma and ASD, Den-Mat’s petition does not state whether Den-Mat intends to comply with § 64.1200(a)(4)(iv) in the future or whether it has implemented any procedures to ensure compliance going forward.<sup>93</sup>

#### **D. The *Stryker* litigation.**

On July 16, 2012, undersigned counsel filed suit against Stryker on behalf of Physicians Healthsource in the Western District of Michigan, alleging Stryker sent a four-page unsolicited fax advertisement to Physicians Healthsource on October 12, 2009.<sup>94</sup> In addition, the complaint alleges that, even if Stryker claims it had “prior express invitation or permission” to send the fax, it violated the opt-out-notice requirements.<sup>95</sup> The complaint alleges Stryker sent the same or similar fax advertisements to “more than 39 other recipients” and that class certification was appropriate.<sup>96</sup>

The fax attached to the complaint invites recipients to a “discussion on the latest advancement in orthopaedics, including arthritis of the hip & knee and advancements in total joint arthroplasty, presented by Dr. Pamela Petrocy,” at a restaurant in Cincinnati, where “dinner will be served.”<sup>97</sup> The fax contains no opt-out notice. On October 23, 2012,

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<sup>91</sup> *Id.* at 1–8.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, No. 12-729 (W.D. Mich.), Compl. (Doc. 1) ¶ 12 .

<sup>95</sup> *Id.* ¶ 18.

<sup>96</sup> *Id.* ¶ 16.

<sup>97</sup> *Id.*, Ex. A.

the district court denied Stryker's motion to dismiss on the basis that the fax is not an "advertisement" as a matter of law, holding that "free seminars can be a pretext to advertise[d] commercial products."<sup>98</sup>

On March 5, 2013, Physicians Healthsource amended the complaint to add as a defendant Howmedica Osteonics Corp., a Stryker subsidiary that sells orthopedic implants.<sup>99</sup> On March 21, 2013, all Stryker defendants answered the amended complaint, asserting an affirmative defense that "Plaintiff's claims are barred because it provided express consent, invitation and/or permission to receiving information from Defendant."<sup>100</sup>

In discovery, the "Stryker Entities" admitted that "a representative of Stryker sent Exhibit A to a telephone facsimile machine at" Physician's Healthsource's fax number and that "a representative of Stryker sent Exhibit A to more than 40 persons in the United States."<sup>101</sup> Asked whether they "maintain[] a record of persons who provided express consent to receive advertisements by facsimile machine and the dates of their consent," the Stryker Entities stated they "deny that Stryker maintains a record of persons who provided express consent to receive advertisements by facsimile transmission."<sup>102</sup>

Asked to admit that it "did not contact Plaintiff and receive Plaintiff's express consent before sending Exhibit A," Howmedica stated it "objects to this Request because it is compound and seeks information in possession of Plaintiff, information which Plaintiff

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<sup>98</sup> *Id.*, Hr'g Tr. (Doc. 36) at 13.

<sup>99</sup> *Id.*, First Amended Compl. (Doc. 49).

<sup>100</sup> *Id.*, Answer & Aff. Defenses to First Amended Compl. (Doc. 56) at 16.

<sup>101</sup> *Id.*, Stryker Entities Obj. & Resp. to Pl.'s First Requests for each Defendant's Admissions (Doc. 96-2) Resp. Nos. 2, 3.

<sup>102</sup> *Id.*, Resp. No. 12.

refuses to provide.”<sup>103</sup> Howmedica stated it “denies that it maintains a record of persons who provided express consent to receive advertisements by facsimile transmission because Howmedica does not send unsolicited advertisements by facsimile transmission.”<sup>104</sup>

Discovery revealed that Stryker purchased its list of fax numbers from a company called Redi-Mail Direct Marketing, Inc., that Stryker sent the October 12, 2009 fax to the numbers on the list using “Fax2Mail,” a desktop faxing software, and that in December 2009, Stryker began using another company called Mudbug Media, Inc., to send faxes to the Redi-Mail list.<sup>105</sup> Stryker claims these faxes were sent with prior express permission because Redi-Mail obtained its list of fax numbers from the American Medical Association (“AMA”), which in turn obtained the fax numbers from physician “Census Forms.”<sup>106</sup>

The AMA’s “Conditions of Usage For Facsimile Transmissions,” which Stryker agreed to in writing, require that all faxes sent using its list must “contain the following notices conspicuously located within the materials”:

If you have questions about this specific fax, or wish to be removed from receiving future faxes from (sender’s name) please call (sender’s phone number).<sup>107</sup>

The conditions of usage also state that Stryker is “legally responsible for compliance with all laws and regulations governing the transmission of unsolicited advertisements and facsimile communications.”<sup>108</sup>

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<sup>103</sup> *Id.*, Howmedica Obj. & Resp. to Pl.’s First Request for Admissions (Doc. 118-4), Resp. No. 11.

<sup>104</sup> *Id.*, Resp. No. 12.

<sup>105</sup> *Id.*, Stryker Entities Obj. & Resp. to First Set of Interrogs. (Doc. 96-2), Resp. Nos. 4, 12, 13.

<sup>106</sup> *Id.*, Howmedica Mem. Supp. Mot. S.J. (Doc. 92) at 6 (Jan. 10, 2014).

<sup>107</sup> *Id.*, Conditions of Usage for Facsimile Transmissions (Doc. 92-4), Page ID 2527.

On July 22, 2013, Physicians Healthsource moved for class certification, explaining that its expert witness, Robert Biggerstaff, reviewed the documents and transmission reports produced by the defendants and concluded that Stryker sent 15,041 faxes to 8,065 unique fax numbers during the class period.<sup>109</sup> Stryker did not contest those conclusions,<sup>110</sup> and on December 11, 2013, the district court certified the following class:

All persons who:

- (1) on or after four years prior to the filing of this action,
- (2) were subscribers of a fax number that received,
- (3) a fax invitation to attend a presentation for primary care physicians on advancements in orthopaedics, arthritis, joint replacement, or joint treatment options,
- (4) received from one or more of Defendants, and
- (5) that did not display a proper opt-out notice.<sup>111</sup>

Throughout 2014, the parties briefed cross-motions for summary judgment on the merits, which are pending.

With 15,041 faxes at issue, Stryker's potential liability in the underlying litigation is between \$7,520,500 (at \$500 per fax) and \$22,561,500 (at \$1,500 per fax). Stryker, a publicly traded corporation, reported gross profits over \$6 billion in 2013.<sup>112</sup> It holds nearly \$4 billion

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*, Pl.'s Mem. Supp. Class Certification (Doc. 61) at 4–5; *see also* Expert Report of Robert Biggerstaff (Doc. 61-8).

<sup>110</sup> *Id.*, Op. & Order (Doc. 88) at 3–4.

<sup>111</sup> *Id.* at 9.

<sup>112</sup> Stryker Corp. 2013 Form 10-K, *available at* <http://www.sec.gov/Archives/edgar/data/310764/000031076414000021/syk10k12312013.htm>.

in “Cash, cash equivalents and current marketable securities.”<sup>113</sup> Stryker does not disclose the *Physicians Healthsource* litigation as a material “risk factor” to investors.<sup>114</sup>

On November 7, 2014, Stryker filed its petition for waiver with the Commission arguing the Opt-Out Order “appl[ies] with equal force” to Stryker because (1) it is “facing a class action lawsuit in which Plaintiffs seek millions of dollars in statutory damages” and (2) “[t]he Junk Fax Order was confusing and contradictory, and its notice of proposed rulemaking did not disclose that the proceeding would lead to the promulgation of the Opt-Out Rule.”<sup>115</sup> Unlike Alma, ASD, and Den-Mat, Stryker does not claim it was “was not aware” of the opt-out requirement, “did not understand” the opt-out requirement, or was “confused” by opt-out requirement when it sent its faxes or that it faces potentially “massive,” “crushing,” or even “significant” liability.<sup>116</sup>

Like Den-Mat, Stryker does not state whether it intends to comply with § 64.1200(a)(4)(iv) in the future or whether it has implemented any procedures to ensure compliance going forward.<sup>117</sup>

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<sup>113</sup> *Id.* at 9.

<sup>114</sup> *Id.* at 18.

<sup>115</sup> *Id.* at 3.

<sup>116</sup> *Id.* at 1–4.

<sup>117</sup> *Id.*

## Argument

- I. The Commission has no authority to “waive” violations of the regulations prescribed under the TCPA in a private right of action, and doing so would violate the separation of powers.
  - A. The Commission has no authority to “waive” its regulations in a private right of action.

The TCPA creates a private right of action for any person to sue “in an appropriate court” for “a violation of this subsection or the regulations prescribed under this subsection,”<sup>118</sup> and directs the Commission to “prescribe regulations” to be enforced in those lawsuits.<sup>119</sup> The “appropriate court” then determines whether “a violation” has taken place.<sup>120</sup> If the court finds “a violation,” the TCPA automatically awards a minimum \$500 in damages for “each such violation” and allows the court “in its discretion” to increase the damages up to \$1,500 per violation if it finds they were “willful[] or knowing[].”<sup>121</sup>

The TCPA does not authorize the Commission to “waive” its regulations in a private right of action.<sup>122</sup> It does not authorize the Commission to intervene in a private right of action.<sup>123</sup> It does not require a private plaintiff to notify the Commission it has filed a private lawsuit.<sup>124</sup> Nor limit a private plaintiff’s right to sue to violations where the Commission

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<sup>118</sup> 47 U.S.C. § 227(b)(3).

<sup>119</sup> *Id.* § 227(b)(2).

<sup>120</sup> *Id.* § 227(b)(3)(A)–(B).

<sup>121</sup> *Id.* § 227(b)(3).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*; *C.f.*, Clean Air Act, 42 U.S.C. § 7604(b) (requiring 60 days prior notice to the EPA to maintain a citizen suit).

declines to prosecute.<sup>125</sup> The Commission plays no role in determining whether “a violation” has taken place, whether a violation was “willful or knowing,” whether statutory damages should be increased, or how much the damages should be increased. These duties belong to the “appropriate court” presiding over the lawsuit.<sup>126</sup>

The Communications Act does, however, grant the Commission authority to enforce the TCPA through administrative forfeiture actions.<sup>127</sup> Private citizens have no role in that process, such as determining whether a violator acted “willfully or repeatedly.”<sup>128</sup> Thus, the TCPA and the Communications Act create a dual-enforcement scheme in which the Commission promulgates regulations that both the Commission and private litigants may enforce but where the Commission plays no role in the private litigation and private citizens play no role in agency enforcement.<sup>129</sup> This is not an unusual scheme. The TCPA is similar to several statutes, including the Clean Air Act, which empowers the EPA to issue regulations imposing emissions standards<sup>130</sup> that are enforceable both in private “citizen suits”<sup>131</sup> and in administrative actions.<sup>132</sup>

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<sup>125</sup> *C.f.*, e.g., 42 U.S.C.A. § 2000e-5(f)(1) (requiring employment-discrimination plaintiffs to obtain “right-to-sue” letter from Equal Employment Opportunity Commission).

<sup>126</sup> *Id.* § 227(b)(3).

<sup>127</sup> *Id.* § 503(b).

<sup>128</sup> *Id.*

<sup>129</sup> *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 688 (7th Cir. 2013) (holding TCPA “authorizes private litigation” and agency enforcement, so consumers “need not depend on the FCC”).

<sup>130</sup> 42 U.S.C. § 7412(d).

<sup>131</sup> 42 U.S.C. § 7604(a).

<sup>132</sup> 42 U.S.C. § 7413(d).

The D.C. Circuit Court of Appeals recently considered the scope of the EPA's role in a private right of action under the Clean Air Act's dual-enforcement scheme in *Nat. Res. Def. Council v. EPA*, (“NRDC”).<sup>133</sup> TCPA Plaintiffs discussed NRDC extensively in a letter to the Commission after it was issued April 18, 2014,<sup>134</sup> and in subsequent comments on waiver petitions.<sup>135</sup> The Opt-Out Order does not cite NRDC.

In NRDC, the D.C. Circuit considered whether the EPA had authority to issue a regulation creating an affirmative defense to a private right of action for violations of emissions standards it issued pursuant to the Clean Air Act, where the violations are caused by “unavoidable” malfunctions.<sup>136</sup> The Court held the agency did not have such authority and struck the regulation down for three main reasons.

First, the court noted the statute grants “any person” the right to “commence a civil action” against any person for a “violation of” the EPA standards.<sup>137</sup> The statute states a federal district court presiding over such a lawsuit has jurisdiction “to enforce such an emission standard” and “to apply any appropriate civil penalties.”<sup>138</sup> To determine whether civil penalties are appropriate, the statute directs the courts to “take into consideration (in addition to such other factors as justice may require)” a number of factors, including “the

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<sup>133</sup> 749 F.3d 1055, 1062 (D.C. Cir. 2014).

<sup>134</sup> Letter of Brian J. Wanca, CG Docket No. 05-338 (May 19, 2014).

<sup>135</sup> See *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Nos. 02-278, 05-338, TCPA Pls.’ Comments on Stericycle Pet. at 7 (July 11, 2014); *id.*, TCPA Pls.’ Comments on Unique Vacations, Inc. Pet. at 6–8 (Sept. 12, 2014).

<sup>136</sup> NRDC, 749 F.3d at 1062.

<sup>137</sup> *Id.* at 1062–63.

<sup>138</sup> *Id.* at 1063.

size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply," etc.<sup>139</sup>

Thus, the D.C. Circuit held, the statute "creates a private right of action" for violations of the regulations and directs the EPA to issue those regulations, but it is "the Judiciary" that "determines 'the scope'—*including the available remedies*" of "statutes establishing private rights of action."<sup>140</sup> The Clean Air Act was consistent with that principle, the court held, because it "clearly vests authority over private suits in the *courts*, not EPA."<sup>141</sup> The court held that, by creating an affirmative defense to the statutory private right of action—as opposed to issuing the regulations to be enforced in those actions as directed by the statute—the EPA impermissibly attempted to dictate to the courts the circumstances under which penalties are "appropriate" and struck down the regulation.<sup>142</sup>

Second, the D.C. Circuit noted that the EPA has dual enforcement authority over the Clean Air Act, which authorizes both private actions and agency actions to enforce the regulations.<sup>143</sup> It also noted the EPA has the power to "compromise, modify, or remit, with or without conditions, any administrative penalty" for a violation in those proceedings.<sup>144</sup> Under this dual-enforcement structure, the court held, "EPA's ability to determine whether penalties should be assessed for Clean Air Act violations extends only to administrative

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.* (quoting *City of Arlington v. FCC*, --- U.S. ---, 133 S. Ct. 1863, 1871 n.3 (2013); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990)).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

penalties, not to civil penalties imposed by a court.”<sup>145</sup> The regulation creating an affirmative defense for “unavoidable” violations ran afoul of that principle.<sup>146</sup>

Third, the Court noted that the Clean Air Act authorizes the EPA to intervene in private litigation.<sup>147</sup> Thus, the Court held that “[t]o the extent that the Clean Air Act contemplates a role for EPA in private civil suits, it is only as an intervenor” or “as an amicus curiae.”<sup>148</sup> An intervenor or amicus curiae has no power to create an affirmative defense in the actions in which it intervenes or submits its views, the court held.<sup>149</sup>

The reasoning of *NRDC* is dispositive here. First, like the Clean Air Act, the TCPA creates a private right of action for “any person” to sue for violations of the regulations prescribed under the statute and directs the Commission to issue those regulations, but it vests the “appropriate court” with the power to determine whether “a violation” has occurred.<sup>150</sup> If the court finds a violation, the TCPA imposes automatic \$500 in damages but allows the court “in its discretion” to increase the damages.<sup>151</sup> The TCPA creates *no role* for the Commission in determining whether a violation has occurred, whether it was willful, or whether damages should be increased. Instead, the TCPA “clearly vests authority over private suits in the *courts*,” not the Commission.<sup>152</sup> Issuing “waivers” to Alma, ASD, Den-

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* The statute also requires the private plaintiff to give notice to the EPA so the agency can decide whether to intervene. 42 U.S.C. § 7604(c)(3).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> 47 U.S.C. § 227(b)(3).

<sup>151</sup> *Id.*

<sup>152</sup> *NRDC*, 749 F.3d at 1063.

Mat, and Stryker to prevent the courts from determining that “a violation” has occurred because these petitioners were “confused” or “presumptively” confused is no different than the EPA issuing an affirmative defense to prevent the courts from determining that civil penalties are “appropriate” because a defendant’s violations were “unavoidable.”

Second, just as the Clean Air Act grants the EPA authority to enforce the regulations through administrative penalties, the Communications Act grants the Commission authority to determine whether penalties should be assessed for TCPA violations in forfeiture actions brought pursuant to 47 U.S.C. § 503(b). Like the EPA’s attempt to dictate “whether penalties should be assessed” in private litigation, granting a “waiver” for the purpose of extinguishing liability against Alma, ASD, Den-Mat, and Stryker would run afoul of the bifurcated dual-enforcement structure Congress has created. The Commission is free to choose not to enforce its regulations against these petitioners, but it cannot make that choice for Physicians Healthsource, Sandusky Wellness, or Dr. Laub.

Third, the Commission has *less* authority for a waiver than the EPA did for its affirmative defense because the Clean Air Act at least allows the EPA to intervene in private actions. The TCPA allows the Commission to intervene only in actions brought by state governments to seek civil penalties for violations of the caller-identification requirements.<sup>153</sup> It creates no role for the Commission in private TCPA actions. If an agency with authority to intervene in a private action enforcing its regulations lacks power to create an affirmative defense in that action, then an agency with no authority to intervene cannot grant an

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<sup>153</sup> 47 U.S.C. § 227(e)(6)(C).

outright “waiver” of a defendant’s liability. The Commission is limited to participating in private TCPA actions “as amicus curiae,” as it often does.<sup>154</sup>

In sum, the Commission has no power to interfere in a private TCPA lawsuit. Under *NRDC*, the Commission could not create an affirmative defense of “confusion” that Alma, ASD, Den-Mat, and Stryker could then attempt to prove up in court.<sup>155</sup> If the Commission cannot do that, it cannot take the more radical step of simply “waiving” the violation without requiring these petitioners to prove (or with respect to Alma, ASD, and Stryker, even *claim*) they were “confused.”

Plaintiffs recognize the Commission issued waivers in the Opt-Out Order, but that should not stop it from reaching the correct conclusion on the Alma, ASD, Den-Mat, and Stryker petitions. The fact that an improper action has been taken once is no justification for doing it again. Plaintiffs respect that some members of the Commission maintain the 2006 opt-out regulation was *ultra vires*. But the principled stance would be to state that position clearly (as these Commissioners did in their statements dissenting in part from the Opt-Out Order), while denying waivers to Alma, ASD, Den-Mat, and Stryker as beyond the Commission’s power. Two wrongs do not make a right, and taking unauthorized action to rectify another perceived unauthorized action does not reflect the rule of law.

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<sup>154</sup> See, e.g., *Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, --- F.3d ---, 2014 WL 5471916, at \*6 (11th Cir. Oct. 30, 2014) (relying on FCC interpretation of TCPA fax rules in amicus letter submitted at court’s request).

<sup>155</sup> Den-Mat has raised the Opt-Out Order as an affirmative defense, asserting that “[a]t all times herein, Den-Mat was reasonably uncertain about whether the opt-out notice requirement . . . applied to faxes sent with the recipient’s prior permission” and “Den-Mat is entitled to retroactive relief for those faxes, if any, that are determined to have been sent with an insufficient opt-out notice.” *Den-Mat*, Answer (Doc. 21) at 8.

**B. A waiver would violate the separation of powers, both with respect to the judiciary and Congress.**

Although *NRDC*, discussed above, implicates the separation of powers, it does not use that term. The seminal separation-of-powers case is *United States v. Klein*,<sup>156</sup> where Congress passed a statute intended to undermine a series of presidential pardons issued during and after the Civil War to former members of the Confederacy. The statute directed the courts to treat the pardons as conclusive evidence of guilt in proceedings brought by such persons seeking compensation for the confiscation of private property by the government during the war, justifying the seizure of their property.<sup>157</sup>

The Supreme Court held the statute violated the separation of powers by forcing a “rule of decision” on the judiciary that impermissibly directed findings and results in particular cases.<sup>158</sup> The Court held one branch of government cannot “prescribe a rule for the decision of a cause in a particular way” to the judicial branch and struck down the law.<sup>159</sup>

But dictating a “rule of decision” is precisely what the “waivers” requested by Alma, ASD, Den-Mat, and Stryker seek to accomplish. The goal, as these petitioners do not hesitate to admit, is to prevent the district courts presiding over their cases from finding “a violation” of the regulations prescribed under the statute. If the waivers are granted, the statute will remain the same. The regulations will remain the same. But the courts will be told they cannot find “a violation” of the regulations under the statute because the Commission

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<sup>156</sup> 80 U.S. 128, 147–48, 13 Wall. 128, 20 L.Ed. 519 (1872).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 146.

<sup>159</sup> *Id.*

has ruled Alma, ASD, Den-Mat, and Stryker were “confused” or “presumptively” confused. That the Commission cannot do.

Alma, ASD, Den-Mat, and Stryker might argue that the courts could still find a violation of the regulation after a waiver; they simply cannot award damages. That does not save their argument because then the “waiver” would abrogate Congress’s directive that when the “appropriate court” finds “a violation,” the private plaintiff is automatically entitled to a minimum \$500 in statutory damages.<sup>160</sup> The Commission has no power to “waive” a statute.<sup>161</sup> From either angle, the Commission cannot encroach on the judiciary or Congress in the manner contemplated by the Alma, ASD, Den-Mat, and Stryker petitions, and it should deny these waivers.

**II. Alma, ASD, Den-Mat, and Stryker are not “similarly situated” to the petitioners covered by the Opt-Out Order, no matter what the standard for a waiver.**

**A. Alma is not “similarly situated.”**

- 1. Alma claims it “was not aware” of the opt-out regulation, not that it was “confused” by it, and “simple ignorance” of the law is not a sufficient basis for a waiver.**

Alma claims it “was not aware” of the requirement to include compliant opt-out notice on faxes sent under a claim of prior express invitation or permission when it sent the

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<sup>160</sup> 47 U.S.C. § 227(b)(3).

<sup>161</sup> *In re Maricopa Community College District Request for Experimental Authority to Relax Standards for Public Radio Underwriting Announcements on KJZZ(FM) and KBAQ(FM), Phoenix, Arizona*, FID Nos. 40095 & 40096, Mem. Op. & Order (rel. Nov. 24, 2014) (“The Commission’s power to waive its own Rules cannot confer upon it any authority to ignore a statute. While some portions of the Act contain specific language authorizing the Commission to waive provisions thereof, the Act grants no such authority with respect to Section 399B.23.”).

faxes at issue in the underlying litigation.<sup>162</sup> Taken at face value, Alma was simply ignorant of the law, which the Commission ruled in the Opt-Out Order is insufficient for a waiver from § 64.1200(a)(4)(iv).<sup>163</sup> If the standard is actual “confusion” about the law, as opposed to simple ignorance, the Commission should deny the Alma petition on this basis alone.

**2. Any “presumption” of confusion is rebutted because Alma had actual knowledge of the opt-out requirements prior to sending its faxes in 2011.**

If the standard for a waiver from § 64.1200(a)(4)(iv) is that a petitioner is considered “presumptively” confused in the absence of evidence the petitioner was simply ignorant of the law or “understood” that it “did, in fact, have to comply with the opt-out notice requirement,”<sup>164</sup> then the presumption is rebutted with respect to Alma. Despite its claim that it was “not aware” of the opt-out requirement, there is ample evidence Alma had actual knowledge of § 64.1200(a)(4)(iv) when it sent its faxes, at least with respect to the faxes sent in September and October 2011.

First, Dr. Geismann sued Alma on October 1, 2008, for violating “the regulations prescribed under 47 U.S.C. sec. 227(b)” in general, and for violating “47 C.F.R. sec. 64.1200(a)([4]),” in particular.<sup>165</sup> Alma’s counsel in the *Geismann* matter must have read the regulation their client was accused of violating, which stated then (as it does today), “[a] facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the

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<sup>162</sup> Alma Pet. at 4.

<sup>163</sup> Opt-Out Order ¶ 26.

<sup>164</sup> *Id.*

<sup>165</sup> Ex. A ¶¶ 13 & 23.

requirements in paragraph (a)(4)(iii) of this section.”<sup>166</sup> The regulation does not refer to footnote 154 in the 2006 Junk Fax Order or the notice of rulemaking leading up to the order, which are the only two sources of “confusion” identified by the Commission. Even if Alma’s attorneys in the *Geismann* litigation failed to advise Alma of the regulation, at least with respect to the 2011 faxes, actual knowledge of § 64.1200(a)(4)(iv) is imputed to Alma.<sup>167</sup>

Second, Alma changed its opt-out notice throughout the class period in an apparent attempt to comply with the rules. The December 2007 fax attached to the *Geismann* complaint provides a phone number but no fax number.<sup>168</sup> The July–August 2008 faxes attached to the *Physicians Healthsource* complaint added a fax number, as required by the regulation.<sup>169</sup> Then, in September and October 2011, Alma changed the opt-out notice again, dropping the phone number, but taking a step forward by advising the recipient to provide the fax number “to which the request relates,” as required for an enforceable opt-out request under § 64.1200(a)(4)(v)(A).<sup>170</sup> Alma may not have done a very good job of complying with the rules, but it was not confused about *whether* compliance was required.

Third, Alma’s contract with Westfax states Alma “will fully comply with” the applicable “laws, rules and regulations, including in particular, the Telephone Consumer Protection Act (“TCPA”) and all state laws similar or related thereto” and warns that “[t]he TCPA provides that the sender is solely liable for opt-out notice compliance and

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<sup>166</sup> § 64.1200(a)(4)(iv).

<sup>167</sup> See, e.g., Restatement (Second) of Agency § 268 (“[N]otification given to an agent is notice to the principal” if given “to an agent authorized to receive it.”).

<sup>168</sup> Ex. A; see 47 C.F.R. § 64.1200(a)(4)(iii).

<sup>169</sup> *Physicians Healthsource v. Alma*, Compl. (Doc. 1), Ex. A.

<sup>170</sup> Ex. D.

violations.”<sup>171</sup> Alma therefore had actual knowledge that there were “laws, rules and regulations” governing its conduct. If anything should be “presumed” based on this record, it is that Alma investigated what the regulations it promised to comply with required.

Fourth, Alma put each fax image through a “sign-off process” in which the content was approved by Alma’s senior director of marketing, Alma’s regulatory department, Alma’s general manager, and Alma’s legal department.<sup>172</sup> Alma’s legal department should be “presumed” to know about the laws governing fax advertisements when signing off on fax advertisements.

At the very least, the combination of factors here—the 2008 lawsuit alleging violations of § 64.1200(a)(4), the evolution of the opt-out notice toward compliance, the contract with Westfax, and the “sign off” by Alma’s legal department—is sufficient to rebut any “presumption” of confusion created by the notice of rulemaking and footnote 154 (neither of which Alma claims to have read). Under these circumstances, even if there is a presumption that Alma was “confused” about whether opt-out notice was required when it sent its faxes, that presumption is rebutted.

**B. ASD is not “similarly situated.”**

- 1. ASD claims it “did not understand” the opt-out regulation, but it does not claim its misunderstanding resulted from footnote 154 or the notice of rulemaking.**

ASD admits it knew about the opt-out regulations when it sent the faxes at issue in the underlying litigation, but claims it “did not understand the opt-out requirement to apply

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<sup>171</sup> *Physicians Healthsource v. Alma*, Westfax/Alma Customer Agreement (Doc. 78-6) ¶¶ 4, 7.

<sup>172</sup> *Id.*, Deposition of Karen Wheeler (Doc. 78-2) at 55.

to solicited faxes.”<sup>173</sup> ASD does not, however, explain *why* it had this misunderstanding.<sup>174</sup> ASD does not, for example, claim its misunderstanding resulted from reading footnote 154 or the notice of rulemaking.<sup>175</sup>

Thus, based on the record before the Commission, it is just as likely ASD misunderstood the law because it obtained bad legal advice (or ignored good legal advice, for that matter). If the standard is actual “confusion” about the law resulting from footnote 154 and the notice of rulemaking, then the Commission should deny the ASD petition on this ground alone.

**2. ASD’s potential liability is not “massive” when compared to its financial resources.**

ASD argues it is “potentially subject to massive liability” in the litigation, but it makes no effort to quantify the potential losses or compare them with ASD’s financial resources.<sup>176</sup> “What might be ‘ruinous’ to a company of modest size might be merely unpleasant to a behemoth.”<sup>177</sup> Thus, in order to determine whether the potential losses are “significant” enough to justify a waiver, the Commission should consider the financial resources of the defendant compared to the size of the potential loss.

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<sup>173</sup> ASD Pet. at 5.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 1–5.

<sup>176</sup> *Id.* at 5.

<sup>177</sup> See *In re Delta Air Lines*, 310 F.3d 953, 961 (6th Cir. 2002).

ASD is a highly profitable pharmaceutical company responsible for \$673 million in income to its parent corporation in 2014 alone.<sup>178</sup> The parent holds \$1.8 billion in cash and cash equivalents.<sup>179</sup> ASD admits it sent fax advertisements to more than 10,000 persons using a purchased, third-party list, but it has not produced documents showing the number of faxes sent. Unless ASD is willing to provide that number in its reply comments, the Commission should presume ASD is subject to potential liability of between \$5 million (10,000 faxes at \$500 per fax) and \$15 million (\$1,500 per fax). That is not a “massive” liability for ASD. It is not even “material,” in the sense that a reasonable investor would take it into the overall mix of information in deciding whether to invest in the company, which is why the litigation is not disclosed in ASD’s Form 10-K as a “risk factor.”<sup>180</sup>

**C. Den-Mat is not “similarly situated.”**

**1. Den-Mat claims it was “confused” about whether opt-out notice was required, but it does not claim its confusion resulted from footnote 154 or the notice of rulemaking.**

Unlike Alma, ASD, and Stryker, Den-Mat states it was actually “confused as to whether Solicited Faxes must include an opt-out notice” when it sent the faxes at issue in the underlying litigation.<sup>181</sup> But Den-Mat does not explain *why* it was confused. For example, it does not claim anyone at the company ever read footnote 154 or the notice of rulemaking.<sup>182</sup>

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<sup>178</sup> See AmerisourceBergen Corp. 2014 Form 10-K at 69–71, *available at* <http://www.sec.gov/Archives/edgar/data/1140859/000104746914009555/a2222308z10-k.htm> at 69–71.

<sup>179</sup> *Id.* at 22.

<sup>180</sup> *Id.* at 68–69.

<sup>181</sup> Den-Mat Pet. at 7.

<sup>182</sup> *Id.* at 1–8.

As with ASD, it is just as likely Den-Mat was “confused” because it obtained bad legal advice or ignored good legal advice. In the absence of additional evidence on this point, if the standard is actual “confusion” resulting from the “combination of factors” identified in the Opt-Out Order (footnote 154 and the notice of rulemaking), then the Commission should deny the Den-Mat petition on this ground alone.

**2. Any presumption of “confusion” should be put on hold to allow investigation into whether Den-Mat was aware of the opt-out rules when it sent its faxes.**

If the Commission “presumptively” accepts Den-Mat’s assertion that it was “confused” about the law when it sent its faxes, then Dr. Laub at this time has no rebuttal evidence that Den-Mat was simply ignorant of the law or had actual knowledge of the law. The underlying lawsuit was filed three months ago, and no discovery has been conducted.

Dr. Laub has a due-process right to investigate whether Den-Mat was aware of the opt-out rules if that factor is dispositive of his private right of action under the TCPA.<sup>183</sup> The Commission may hold such “proceedings as it may deem necessary” for such purposes and may “subpoena witnesses and require the production of evidence” as the Commission determines “will best serve the purposes of such proceedings.”<sup>184</sup> In the alternative, Dr. Laub requests the Commission stay a ruling on the Den-Mat petition and order that it will not rule on the petition until Plaintiff has completed discovery regarding Den-Mat’s actual

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<sup>183</sup> See, e.g., *Applications of Comcast Corp. and Time Warner Cable Inc. For Consent To Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57; *Applications of AT&T, Inc. and DIRECTV For Consent To Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Dissenting Statement of Commissioner Pai (arguing Commission violated petitioners’ “due process rights” by denying “serious arguments that merit the Commission’s thoughtful consideration”).

<sup>184</sup> 47 C.F.R. § 1.1.

knowledge (or lack thereof) of the law prior to sending its faxes before the United States District Court for the Central District of California.

**3. Den-Mat has provided no evidence that it faces “crushing” potential liability in the private litigation.**

Den-Mat claims it faces the risk of “crushing” liability in the litigation, but it provides no evidence to support that contention. No discovery has been conducted, and the operative allegation is that Den-Mat sent “at least forty” faxes in violations of the TCPA.<sup>185</sup> Den-Mat denies that allegation.<sup>186</sup> Putting aside the denial, the record before the Commission is that Den-Mat is subject to potential liability between \$20,000 (at \$500 per fax) and \$60,000 (at \$1,500 per fax).

Den-Mat has provided no evidence of its financial resources, but it claims to have “more than 400 employees.”<sup>187</sup> It is debatable whether 400 employees qualifies as “a small company,” as Den-Mat’s petition describes it,<sup>188</sup> but in the absence of any countervailing evidence, the Commission should not presume Den-Mat’s potential liability would be “crushing” or even “significant” in relation to its financial resources.

**D. Stryker is not “similarly situated.”**

**1. Stryker does not claim it was “confused” about whether opt-out notice was required when it sent its faxes.**

Unlike Alma, ASD, and Den-Mat, Stryker does not claim it was “was not aware” of the opt-out rules, “did not understand” those rules, or was “confused” about those rules

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<sup>185</sup> *Den-Mat*, Compl. (Doc. 1) ¶ 19.

<sup>186</sup> *Id.*, Answer (Doc. 21) ¶¶ 15, 19.

<sup>187</sup> <http://www.denmat.com/history>.

<sup>188</sup> *Den-Mat Pet.* at 1.

when it sent it faxes.<sup>189</sup> Stryker does not claim it ever read footnote 154 or the notice of rulemaking.<sup>190</sup> If the standard is actual “confusion” about the law, then the Commission should deny Stryker’s petition on this ground alone.

**2. Any presumption of confusion is rebutted because Stryker had actual notice of the opt-out rules when it sent its faxes.**

Stryker obtained its list of fax numbers under an obligation to include “conspicuously located” opt-out notice complying with “all laws and regulations governing the transmission of unsolicited advertisements and facsimile communications.”<sup>191</sup> Thus, Stryker knew there were “regulations” governing fax transmission of “unsolicited advertisements” in particular and “facsimile communications” in general.

If Stryker had investigated the “regulations” it promised to follow, it would have read that “[a] facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.”<sup>192</sup> It would not have read footnote 154 in the 2006 Junk Fax Order. Nor would it have known about the arguably inadequate notice of rulemaking that was issued years earlier. It simply would have read the plain language of the regulation and known that it was required to include opt-out language if it intended to claim permission in a future lawsuit. At the very least, this evidence rebuts any “presumption” of confusion under the Opt-Out Order.

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<sup>189</sup> Stryker Pet. at 1–4.

<sup>190</sup> *Id.* at 1–5.

<sup>191</sup> *Physicians Healthsource v. Stryker*, Conditions of Usage for Facsimile Transmissions (Doc. 92-4), Page ID 2527.

<sup>192</sup> 47 C.F.R. § 64.1200(a)(4)(iv).

**3. Stryker's potential liability is not "significant" in comparison to its financial resources.**

Stryker complains it faces "millions of dollars in statutory damages," but unlike Alma, ASD, and Den-Mat, it does not claim that would be a "massive," "crushing," or even "significant" loss for Stryker.<sup>193</sup> Stryker's maximum exposure for the 15,041 faxes covered by the *Physicians Healthsource* class definition is \$22.56 million. That is 0.38% of Stryker Corp.'s gross profit in 2013.<sup>194</sup> If Stryker had to write a check for that amount today, it would diminish its "on hand" cash and cash equivalents by 0.56%.<sup>195</sup> That is why Stryker does not disclose the *Physicians Healthsource* litigation as a material "risk factor" in its SEC filings.<sup>196</sup> Its potential liability is infinitesimal when compared to its financial resources.

Paying a judgment in the *Physicians Healthsource* case would, at worst, be "merely unpleasant" for a "behemoth" like Stryker.<sup>197</sup> To the extent the threat of "significant" liability was a factor in the Opt-Out Order, that threat is not present with respect to Stryker.

**III. The proceedings on reconsideration of the 2006 Junk Fax Order—which the Commission has not yet considered on a waiver petition—demonstrate interested parties immediately understood the opt-out rules and were not "confused" by footnote 154 or the notice of rulemaking.**

The proceedings following the 2006 Junk Fax Order were not discussed in any of the petitions covered by the Opt-Out Order or any of the comments on those petitions. The record of those proceedings demonstrates that regulated parties immediately understood that

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<sup>193</sup> Stryker Pet. at 3.

<sup>194</sup> Stryker Corp. Form 8-K, at <http://www.sec.gov/Archives/edgar/data/310764/000031076414000008/sykexhibit012214.htm>.

<sup>195</sup> *Id.* at 9.

<sup>196</sup> *Id.* at 18.

<sup>197</sup> *See In re Delta Air Lines*, 310 F.3d at 961.

the plain language of the 2006 rules required opt-out notice on faxes sent with permission and that no one was “confused” by footnote 154 or the notice of rulemaking. There were two petitions for reconsideration of the 2006 Junk Fax Order, one of which was filed by the law firm of Levanthal Senter & Lerman (“LSL”) on behalf of CBS and other broadcasting clients on June 2, 2006.<sup>198</sup>

The LSL petition noted that the new rules required “that all faxed advertisements include an opt-out notice,” including those sent with permission.<sup>199</sup> The LSL petition did not seek reconsideration of the rule; it sought clarification that it could place the opt-out notice on a cover page, arguing consumers who previously gave permission would still be able to “exercise their right to opt-out of unwanted faxed advertisements.”<sup>200</sup> Public notice of the LSL petition for reconsideration was published in the Federal Register pursuant to Rule 1.429(e) on June 28, 2006.<sup>201</sup>

Three parties filed comments on the LSL petition, including the American Society of Association Executives (“ASAE”) and the Named State Broadcasters Associations (“NSBA”).<sup>202</sup> The ASAE acknowledged that the 2006 Junk Fax Order states, “entities that send facsimile advertisements to consumers from whom they obtained permission, must

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<sup>198</sup> *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Nos. 02-278, 05-338, Petition for Reconsideration or Clarification of Levanthal Senter & Lerman PLLC (June 2, 2006) (“LSL Petition”) at 1.

<sup>199</sup> *Id.* at 2.

<sup>200</sup> *Id.* at 7.

<sup>201</sup> *Petitions for Reconsideration of Action in Rulemaking Proceeding*, 71 Fed. Reg. 36798, 36798 (June 28, 2006).

<sup>202</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Nos. 02-278, 05-338, Comments of American Society of Association Executives (July 12, 2006); National Association Broadcasters Comments (July 13, 2006); Joint Comments of the Named State Broadcasters Associations (July 13, 2006).

include on the advertisements their opt-out notice and contact information to allow consumers to stop unwanted faxes in the future.”<sup>203</sup>

The ASAE argued the “plain language” of this rule inappropriately extended to “solicited facsimile advertisements” and asked the Commission to “vacate” it.<sup>204</sup> The relevant section of ASAE’s 2006 comments reads as follows in its entirety:

The plain language of this provision imposes the opt-out notice requirement on both unsolicited and *solicited* facsimile advertisements. The Fax Act requires advertisers to include such notices only on any *unsolicited* facsimile advertisement, but neither the Fax Act nor the Telephone Consumer Protection Act of 1991 (“TCPA”) authorizes the Commission to impose any notice requirement on *solicited* facsimile advertisements.

By applying the notice requirement to solicited facsimile advertisements, the Commission has exceeded its authority, especially with respect to nonprofit associations. In the Fax Act, Congress explicitly authorized the Commission to exempt nonprofit professional and trade associations from any notice requirement whatsoever. This provision demonstrates that Congress recognized the favored, unique position of nonprofit associations and did not intend for the Commission to impose additional requirements on such associations – especially requirements unauthorized by Congress through the Fax Act, the TCPA, or otherwise.

Accordingly, ASAE respectfully urges the Commission to vacate the portion of the Report and Order that imposes a notice requirement with respect to *solicited* facsimile advertisements.<sup>205</sup>

The ASAE did not argue footnote 154 or the notice of rulemaking made the ruling “confusing.”<sup>206</sup> It argued the “plain language” was clear.<sup>207</sup>

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<sup>203</sup> ASAE Comments at 4.

<sup>204</sup> *Id.* at 2.

<sup>205</sup> *Id.* at 4–5.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

The NSBA raised the same arguments, asking the Commission to “vacate the notice requirement to the extent it applies to solicited facsimile advertisements” on the basis that the Commission “lack[ed] the authority” to issue it under the TCPA.<sup>208</sup> The NSBA argued the Commission should “on its own motion” correct this “critical flaw” in the 2006 Junk Fax Order.<sup>209</sup>

Following the ASAE and NSBA comments, either of the two parties that filed timely petitions for reconsideration of the 2006 order (the Direct Marketing Association and LSL) could have sought to “supplement” their petitions to argue that the rules were “confusing” via a “separate pleading stating the grounds for acceptance of the supplement,” as allowed by Rule 1.429.<sup>210</sup> Neither petitioner did so.

On October 14, 2008, the Commission decided the two petitions for reconsideration, which it granted in part and denied in part.<sup>211</sup> The Commission denied LSL’s request to allow opt-out notice to appear on a cover page.<sup>212</sup> The order does not expressly address the challenges to the Commission’s statutory authority to require opt-out notice on faxes sent with permission raised in in the ASAE and NSBA comments.<sup>213</sup>

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<sup>208</sup> Named State Broadcasters Associations Comments at 3.

<sup>209</sup> *Id.* at 5–6.

<sup>210</sup> 47 C.F.R. § 1.429l; *see also 21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 199 (D.C. Cir. 2003) (refusing to consider constitutional challenge on appeal where party sought to supplement a timely petition for reconsideration but failed to explain why argument was omitted from petition).

<sup>211</sup> *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Nos. 02-278, 05-338, Order on Reconsideration, 23 FCC Rcd 15059 (rel. Oct. 14, 2008) ¶ 23.

<sup>212</sup> *Id.* ¶ 15.

<sup>213</sup> *Id.* ¶¶ 1–24.

No party petitioned for reconsideration of the 2008 order pursuant to Rule 1.429 on the basis that the rules were “confusing.”<sup>214</sup> No party appealed the 2006 order or the 2008 order under the Communications Act and the Hobbs Act on the basis that the rules were “confusing” or violated the notice requirements of the Administrative Procedures Act. No party filed a petition to “clarify” the rule until more than two years later, when Anda filed its petition November 30, 2010. No party petitioned to repeal or amend the opt-out-notice rule until nearly five years later, when Staples filed its petition July 19, 2013.

In sum, the record of proceedings demonstrates that regulated parties immediately understood the plain language of the rules and were not confused by footnote 154 or the notice of rulemaking. Contemporaneous legal observers immediately understood the rule.<sup>215</sup> The courts understood the plain language of the rule.<sup>216</sup> There is no evidence in the record of anyone in particular ever actually being “confused” by footnote 154 or the notice of rulemaking and, in light of the record on the 2006 petitions for reconsideration (which was not considered in the Opt-Out Order), there is now affirmative evidence in the record that regulated parties were *not* confused. Based on this record, the Commission cannot reasonably find that Alma, ASD, Den-Mat, or Stryker were actually “confused” about the

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<sup>214</sup> 47 C.F.R. § 1.429; see *N. Am. Telecommc'ns Ass'n v. FCC*, 772 F.2d 1282, 1286 (7th Cir. 1985) (telecommunications association could obtain review of FCC orders by appealing from FCC's subsequent reconsideration decision within appropriate time, even though association's prior appeal of substantive FCC order had been dismissed as untimely).

<sup>215</sup> See, e.g., *FCC Issues Regulations Implementing Junk Fax Prevention Act*, 60 Consumer Fin. L.Q. Rep. 401 (Fall 2006) (“The opt-out notice must be included in all facsimile advertisements, including those based on an established business relationship or in response to a recipient's prior express invitation or permission.”).

<sup>216</sup> See, e.g., *In re Sandusky Wellness Ctr., LLC*, 570 F. App'x 437 (6th Cir. 2014) (ordering district court to apply the rule); *Nack v. Walburg*, 715 F.3d 680, 687 (8th Cir. 2013) (citing “plain language” of the rule); *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 683 (7th Cir. 2013) (applying plain language of the rule in affirming class certification and summary judgment).

law or that they were “presumptively” confused about the law in the absence of evidence of simple ignorance or actual knowledge.

**IV. Allowing Alma, ASD, Den-Mat, and Stryker to send opt-out-free fax advertisements until April 30, 2015, would endanger public health and safety.**

Even if the Commission grants Alma, ASD, Den-Mat, and Stryker *retroactive* waivers for past conduct, it should not grant them *prospective* waivers immunizing them from future violations of § 64.1200(a)(4)(iv) through April 30, 2015. These petitioners have a history of targeting doctors and other medical professionals with their faxes. Congress found in the TCPA that “when an emergency or medical assistance telephone line is seized,” unrestricted advertising can be “a risk to public safety.”<sup>217</sup> Two doctors commented in these proceedings that they use fax technology to transmit and receive time-sensitive patent information and that unwanted fax advertisements disrupt patient care.<sup>218</sup>

The Opt-Out Order ruled that the “interplay” between the notice requirement and the requirement that an opt-out request is enforceable only if it uses the instructions on the fax did not counsel against a *retroactive* waiver under the “particular circumstances” at issue.<sup>219</sup> But it did not expressly address the interplay of those rules with respect to a *prospective* waiver. Plaintiffs request the Commission do so with respect to the current petitions out of concern for public health and safety.

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<sup>217</sup> Telephone Consumer Protection Act of 1991, Pub. L. 102–243, § 2(5) (Dec. 20, 1991).

<sup>218</sup> See Comments of Dr. John Lary, M.D., CG Docket No. 05-338 (Feb. 19, 2014) (stating Dr. Lary’s office “receives many unsolicited and unwanted faxes” and that it is “disruptive and potentially dangerous”); TCPA Pls.’ Ex Parte Notice, CG Docket No. 05-338 (Aug. 27, 2014) (summarizing Dr. Richard Maynard’s comments in meeting with Commission staff that his office is often *required* to send and receive patient information by fax and that fax advertisements disrupt his practice).

<sup>219</sup> Opt-Out Order ¶ 25, n.91.

Unbound by § 64.1200(a)(4)(iv), Alma, ASD, Den-Mat, and Stryker would be free to send faxes with no opt-out mechanisms to their preferred targets until April 30, 2015. That would “effectively lock in” any permission they have today by making it impossible to revoke permission, which is precisely what the Commission sought to avoid in the Opt-Out Order.<sup>220</sup> If, for example, a doctor agreed to receive one fax advertisement for a particular product from one of the petitioners, the petitioner could then program its software (or instruct its fax broadcaster) to send fax advertisements to the doctor’s fax line *continuously* until 11:59 p.m. on April 30, 2015. The doctor’s fax machine would be useless for anything but printing advertisements for months, and there would be nothing the doctor could do to stop it. Not even filing a lawsuit under the TCPA’s private right of action would revoke permission, because that is not an authorized opt-out mechanism.<sup>221</sup>

TCPA defendants typically respond that all faxes must include header information, and fax advertisements usually include some kind of contact information to purchase a product, sign up for a “free seminar,” etc., so the recipient could use these avenues to communicate an opt-out request. The problem is that the Commission has already ruled that permission may be revoked only by “using the telephone number, facsimile number, website address or email address provided by the sender *in its opt-out notice*.”<sup>222</sup> The Opt-Out Order expressly declined to change that rule or grant a reciprocal “waiver” of the fax recipient’s obligations.<sup>223</sup>

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<sup>220</sup> *Id.* ¶ 20.

<sup>221</sup> 47 C.F.R. § 64.1200(a)(4)(v).

<sup>222</sup> 2006 Junk Fax Order ¶ 34.

<sup>223</sup> Opt-Out Order ¶ 25, n.91.

Thus, if Alma, ASD, Den-Mat, and Stryker choose not to include opt-out notice on fax advertisements they contend are sent a doctor's permission until April 30, 2015, then the doctors will have no way to revoke permission. A telephone call to the number provided by the sender for sales or to register for the "free seminar" is not an enforceable opt-out request; it is an informal complaint that the sender is free to ignore. The Opt-Out Order concluded this was an acceptable trade-off with respect to faxes sent in the *past*,<sup>224</sup> but the parties who sent those faxes were ostensibly "confused" about whether their faxes were legal, which would have tempered the faxing activity of a reasonable person. Granting immunity for faxes sent in the *future* by Alma, ASD, Den-Mat, and Stryker, in contrast, would give these parties free reign to send as many "locked in" fax advertisements as possible to doctors for the next several months.

The risk is especially acute with respect to Alma, ASD, and Stryker—it is unknown how Den-Mat obtained its fax list or what its basis for claiming permission is—since these petitioners contend a fax advertiser can obtain prior express permission simply by asking doctors to provide their fax numbers (Alma) or by purchasing a list from a third party (ASD and Stryker). Granting these petitioners prospective waivers will embolden these misconceptions and encourage petitioners to send fax advertisements to medical-care providers who need their fax machines to be available for legitimate business. In sum, allowing Alma, ASD, Den-Mat, and Stryker to opt-out-free faxes to doctors from whom they claim to have obtained "prior express invitation or permission" until April 30, 2015, would threaten public health and safety.

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<sup>224</sup> *Id.*

### Conclusion

The Commission should deny the Alma, ASD, Den-Mat, and Stryker petitions for waivers because the Commission has no authority to “waive” a regulation in a private right of action under the TCPA and doing so would encroach on the judiciary’s power to determine whether “a violation” of the regulations has taken place and Congress’s power to impose statutory damages for “each such violation.” These petitioners are also not “similarly situated” to the petitioners covered by the Opt-Out Order, since Alma and Stryker had actual knowledge of the rules when they sent their faxes, ASD bought third-party lists of fax numbers, and the only petitioner to claim it was actually “confused,” Den-Mat, does not claim it was confused as a result of the factors identified in the Opt-Out Order.

In addition, the Commission should consider the 2006 proceedings after the opt-out regulation was issued, which demonstrate that regulated parties immediately understood the plain language of the opt-out rules and were not “confused” by footnote 154 or the notice of rulemaking, rebutting any presumption of “confusion” (if that is indeed the standard).

Finally, the Commission should not grant prospective waivers to Alma, ASD, Den-Mat, and Stryker because these petitioners target doctors and other medical-care providers with fax advertisements, and a prospective waiver would allow them to “effectively lock in” permission by sending opt-out-free fax advertisements until April 30, 2015, threatening public health and safety.

Respectfully submitted,

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